

1 THE HONORABLE JOHN C. COUGHENOUR  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 NORTHWEST ENVIRONMENTAL  
11 ADVOCATES,

12 Plaintiff,

13 v.

14 U.S. DEPARTMENT OF COMMERCE, *et*  
15 *al.*,

16 Defendants,

17 WASHINGTON STATE,

18 Defendant-Intervenor.

CASE NO. C16-1866-JCC

ORDER

19 This matter comes before the Court on Plaintiff's motion for partial summary judgment  
20 (Dkt. No. 93-1) and Defendants' cross-motion for partial summary judgment (Dkt. No. 108).  
21 Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral  
22 argument unnecessary and hereby DENIES Plaintiff's motion and GRANTS Defendants' cross-  
23 motion for the reasons explained herein.

24 **I. BACKGROUND**

25 The Court previously articulated background information and summarized the associated  
26 statutory schemes at issue in this case and will not repeat that information here. (See Dkt. Nos.

1 39, 56, 58, 79, 84.) Plaintiff and Defendants have filed cross-motions for partial summary  
2 judgment (Dkt. Nos. 93-1, 108) solely as to Claims #2 and #3 from Plaintiff's Second Amended  
3 and Supplemental Complaint (Dkt. No. 74 at 28–29) consistent with a stipulated briefing  
4 schedule (Dkt. Nos. 87, 103). Plaintiff brings these claim pursuant to the Administrative  
5 Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*, seeking judicial review of agency actions.

6 Plaintiff alleges that the U.S. Environmental Protection Agency (“EPA”) and the  
7 National Oceanic and Atmospheric Administration (“NOAA”) failed to withhold required  
8 amounts from annual grants the agencies make to Washington to reduce and manage  
9 Washington’s nonpoint sources of water pollution. (*Id.* at 28–29.) The grants are made pursuant  
10 to Section 319 of the Clean Water Act (“CWA”), 33 U.S.C. § 1329(h)(1), and Section 306 of the  
11 Coastal Zone Management Act (“CZMA”), 16 U.S.C. § 1455(a). NOAA and EPA are required  
12 to withhold certain amounts from those grants if Washington fails to “submit an approvable  
13 [Section 306] program.” 16 U.S.C. § 1455b(c)(3). It is undisputed that NOAA has yet to finally  
14 approve Washington’s Section 306 program. (*See generally* Dkt. No. 108.)

15 Plaintiff asserts that because Washington has not submitted an approvable Section 306  
16 program, NOAA and EPA have failed to meet their statutory obligations to withhold amounts  
17 from Washington’s CWA Section 319 and CZMA Section 306 grants for years beginning no  
18 later than 2002 and potentially as early as 1996. (Dkt. No. 93-1 at 17–31.) Plaintiff asks the  
19 Court to set aside prior grants and compel Defendants to withhold required amounts from future  
20 grants until Washington submits an approvable program. (*Id.* at 31.) Defendants contend that  
21 Plaintiff lacks standing to assert Claims #2 and #3, that these claims are barred by the statute of  
22 limitations, that APA review does not apply to the type of agency action at issue in Claims #2  
23 and #3, and that even if APA review does apply, the agencies have not unreasonably delayed  
24 withholding grant funds. (Dkt. No. 108 at 12–27.)

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1       **II.     DISCUSSION**

2           **A.     Legal Standard**

3           The APA provides for judicial review of agency actions for any person “adversely  
4     affected or aggrieved” by a “final agency action for which there is no other adequate remedy in a  
5     court.” 5. U.S.C. §§ 702, 704. Where questions before the Court are purely legal, the Court can  
6     resolve an APA challenge on a motion for summary judgment. *See Fence Creek Cattle Co. v.*  
7     *U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010). The Court’s role is to determine whether,  
8     as a matter of law, evidence in the administrative record supports the agency’s decision.  
9     *Occidental Eng’g Co. v. I.N.S.*, 753 F.2d 766, 769 (9th Cir. 1985).

10          **B.     Standing**

11          As a threshold matter, the Court must ensure it has subject matter jurisdiction, a key  
12     component of which is Article III standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559 (1992).  
13     “Constitutional standing concerns whether the plaintiff’s personal stake in the lawsuit is  
14     sufficient to make out a concrete ‘case’ or ‘controversy’ to which the federal judicial power may  
15     extend under Article III, § 2.” *Pershing Park Villas Homeowners Ass’n v. United P. Ins. Co.*, 219  
16     F.3d 895, 899 (9th Cir. 2000). The burden falls on the party asserting standing. *Kokkonen v.*  
17     *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). At the summary judgment stage, a  
18     plaintiff cannot rest on “mere allegations [of standing], but must set forth by affidavit or other  
19     evidence specific facts” to support it. *Gerlinger v. Amazon.com Inc., Borders Group, Inc.*, 526  
20     F.3d 1253, 1255–56 (9th Cir. 2008). “A plaintiff’s basis for standing ‘must affirmatively appear  
21     in the record.’” *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1228 n.5 (9th  
22     Cir. 2008) (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 (1986)).

23          Defendants previously moved to dismiss on the basis that Plaintiff lacks Article III  
24     standing. (Dkt. No. 21 at 36.) The Court denied the motion after finding that Plaintiff adequately  
25     pled sufficient facts that, if proven, demonstrate standing. (Dkt. No. 39 at 6–8.) Defendants  
26

1 reassert their standing argument here (*see* Dkt. No. 108 at 12), which the Court will reconsider<sup>1</sup>  
2 in light of “the manner and degree of evidence required at th[is] successive stage[] of the  
3 litigation.” *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013).

4 Generally, to establish Article III standing, Plaintiff must present sufficient evidence to  
5 demonstrate the following: (1) a particularized and concrete injury, (2) that is fairly traceable to  
6 the challenged conduct, (3) that is likely to be redressed by a favorable decision. *Lujan*, 504 U.S.  
7 at 560–61.<sup>2</sup> However, this evidentiary burden is reduced for plaintiffs alleging a procedural  
8 injury. Such plaintiffs ““must show only that they have a procedural right that, if exercised, *could*  
9 protect their concrete interests.”” *Salmon Spawning*, 545 F.3d at 1226 (emphasis in original)  
10 (quoting *Defenders of Wildlife v. U.S. E.P.A.*, 420 F.3d 946, 957 (9th Cir. 2005)); *see also*  
11 *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (a person “who has been accorded a  
12 procedural right to protect his concrete interests can assert that right without meeting all the  
13 normal standards for redressability and immediacy.”).

14       1.       Procedural Injury

15 Plaintiff alleges solely a procedural injury for purposes of Claims #2 and #3. (*See*  
16 *generally* Dkt. Nos. 93-1, 109.) Specifically, Plaintiff alleges that NOAA and EPA’s failure to  
17 withhold funds from Washington’s CZMA Section 306 and CWA Section 319 grants pursuant to  
18 the Coastal Zone Reauthorization Amendments of 1990 (“CZARA”), 16 U.S.C. § 1455b,

19 \_\_\_\_\_  
20       <sup>1</sup> Reconsideration is not barred by the law of the case doctrine, as the doctrine is “not an  
21 absolute bar to reconsideration of matters previously decided.” *See Jenkins v. Cty. of Riverside*,  
22 398 F.3d 1093, 1094 n.2 (9th Cir. 2005). Notably, the parties’ evidentiary burdens have changed  
23 since the Court’s prior ruling. Further, “the concerns implicated by the issue of standing—the  
24 separation of powers and the limitation of this Court’s power to hearing cases or controversies  
25 under Article III of the Constitution—trump the prudential goals of preserving judicial economy  
26 and finality.” *Public Interest Research Group v. Magnesium Elektron, Inc.*, 123 F.3d 111, 116–  
19 (3d Cir. 1997).

2       <sup>2</sup> Defendants concede that, to the extent Plaintiff meets the requirements described above,  
it also meets the requirements for organizational standing. (Dkt. No. 111 at 5 n.1); *see Friends of*  
*the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 181 (2000). Therefore, the Court need  
not address the issue of organizational standing.

1 represents a procedural injury. (*Id.*) “To establish a procedural ‘injury in fact, [a plaintiff] must  
2 allege . . . that (1) the [agency] violated certain procedural rules; (2) these rules protect [a  
3 plaintiff’s] concrete interests; and (3) it is reasonably probable that the challenged action will  
4 threaten their concrete interests.”” *San Luis & Delta-Mendota Water Auth. v. Haugrud*, 848 F.3d  
5 1216, 1232 (9th Cir. 2017) (alterations in original) (quoting *Nuclear Info. & Res. Serv. v.*  
6 *Nuclear Regulatory Comm’n*, 457 F.3d 941, 949 (9th Cir. 2006)); *see, e.g., Friends of Santa*  
7 *Clara River v. U.S. Army Corps of Engineers*, 887 F.3d 906, 918 (9th Cir. 2018) (applying same  
8 standard); *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004) (same).

9 The Supreme Court first considered a procedural injury as a basis for standing in *Lujan*.  
10 504 U.S. at 572. The injury flowed from the Endangered Species Act’s (“ESA”) citizen-suit  
11 provision, 16 U.S.C. § 1540(g), as applied to ESA’s section 7(a)(2) interagency consultation  
12 requirement. *Id.* Since then, courts have considered a variety of alleged procedural injuries in the  
13 environmental context. Generally, those injuries resulted from an agency’s failure to meet  
14 procedural requirements designed to inform that agency’s later substantive determination. *See,*  
15 *e.g., Summers*, 555 U.S. at 496–97; *Cal. ex rel. Imperial Cty. Air Pollution Control Dist. v. U.S.*  
16 *Dept. of the Int.*, 767 F.3d 781, 790 (9th Cir. 2014); *Salmon Spawning*, 545 F.3d at 1225–26;  
17 *Citizens for Better Forestry v. U.S. Dept. of Agric.*, 341 F.3d 961, 970; *Env’tl. Def. Ctr., Inc. v.*  
18 *U.S. E.P.A.*, 344 F.3d 832, 867 (9th Cir. 2003).

19 Defendants argue that because NOAA and EPA’s withholding requirement does not  
20 inform further action on the part of those agencies, the agencies’ withholding obligation cannot  
21 be a procedural requirement. (Dkt. Nos. 108 at 13–14, 111 at 5–8.) The Court disagrees. While  
22 this case is not an “archetypal procedural injury” case, where “the same actor [is] responsible for  
23 the procedural defect and the injurious final agency action,” this does not preclude a finding that  
24 the agencies’ withholding obligation is procedural. *Natl. Parks Conservation Ass’n v. Manson*,  
25 414 F.3d 1, 5 (D.C. Cir. 2005). CZARA splits responsibilities between state and federal actors.  
26 NOAA and EPA are responsible for the procedural requirements—withholding grant funds from

1 states who have not yet submitted approvable programs. 16 U.S.C. §1455b(c)(3), (4). States are  
2 responsible for the substantive requirements—developing and implementing approvable  
3 programs to manage nonpoint sources of pollution. 16 U.S.C. §1455b(a)(1); 33 U.S.C.  
4 § 1329(b)(1).

5 For example, in *Natl. Parks*, the “ultimate source of injury [was] two steps removed from  
6 the alleged procedural defect.” 414 F.3d at 5. EPA was responsible for the procedural act—  
7 determining whether a proposed power plant would “have an adverse impact” on air quality—  
8 and a state agency was responsible for the substantive act—permitting the power plant in  
9 accordance with the Clean Air Act, 42 U.S.C. § 7401 *et seq.* *Id.* at 4. Even though EPA’s  
10 decision to withdraw its adverse impact determination did not directly harm the *Natl. Parks*  
11 plaintiffs’ interests in clean air, the court found that the plaintiffs had a concrete interest in  
12 ensuring EPA’s reasoned approach to such a determination. 414 F.3d at 5. This case is analogous  
13 in that NOAA and EPA’s withholding obligations are similarly removed from Plaintiff’s interest  
14 in the improved management of nonpoint source pollution. Yet, like in *Natl. Parks*, this level of  
15 attenuation does not transform the agencies’ withholding obligation into a substantive  
16 requirement.

17 However, a finding that NOAA and EPA’s withholding obligation is, indeed, a  
18 procedural one does not end the standing analysis. “[D]eprivation of a procedural right without  
19 some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is  
20 insufficient to create Article III standing.” *Summers*, 555 U.S. at 496. Plaintiff must put forth  
21 sufficient evidence to demonstrate that CZARA’s withholding obligations protect Plaintiff’s  
22 concrete interests and that it is reasonably probable that the agencies’ failure to withhold  
23 threatens those interests. *San Luis & Delta-Mendota Water Auth.*, 848 F.3d at 1232.

24 The “concrete interest test” requires “a geographic nexus between [a plaintiff] and the  
25 location suffering an environmental impact.” *Citizens for Better Forestry*, 341 F.3d at 971.  
26 Plaintiff provides uncontested evidence satisfying this requirement. Specifically, Plaintiff

1 provides affidavits from its members demonstrating their concrete interests in the quality of  
2 Washington's coastal waters. (See Dkt. Nos. 28 at 3, 29 at 4, 30 at 6, 31 at 5, 32 at 3) (describing  
3 members' use of Washington's shorelines and waters for spiritual balance and solace, to recreate,  
4 beachcomb, fish, crab, gather shellfish, birdwatch, and whale watch). Plaintiff also provides  
5 citations to the record and extra-record evidence<sup>3</sup> showing that its members' interests would  
6 benefit from the improved management of nonpoint sources of pollution. See AR<sup>4</sup> WA319-  
7 002797 (describing the following demonstrated harms to Washington's shorelines and coastal  
8 waters from nonpoint sources of water pollution: "sediment erosion . . . elevated bacteria levels  
9 in rivers and streams and in coastal nearshore areas . . . contamination and closure of shellfish  
10 harvest areas"); (Dkt. Nos. 92-2 at 14, 92-3 at 6) (describing demonstrated harms to local  
11 salmonoid and non-salmonoid priority species from nonpoint sources of pollution); AR  
12 CZ0011527 (describing demonstrated harms to Southern Resident Killer Whales from nonpoint  
13 sources of pollution).

14 But a concrete interest is not enough. "[T]he redress[a]bility requirement is not toothless  
15 in procedural injury cases' . . . [p]rocedural rights 'can loosen . . . the redressability prong,' not  
16 eliminate it." *Friends of Santa Clara River*, 887 F.3d at 918 (9th Cir. 2018) (quoting *Salmon  
17 Spawning*, 545 F.3d at 1227; *Summers*, 555 U.S. at 497). Plaintiff must show that it is *reasonably  
18 probable* that NOAA and EPA's failure to withhold funds threatens Plaintiff's concrete interests.  
19 *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 (9th Cir. 2011). This is where Plaintiff's  
20 standing argument fails. Plaintiff provides no evidence that its interests are threatened by the  
21 agencies' failure to withhold funds. (See generally Dkt. Nos. 93-1, 109.) Instead, Plaintiff relies  
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23       <sup>3</sup> The Court takes judicial notice of extra-record evidence Plaintiff presents from agency  
24 websites to the extent it goes to the issue of jurisdiction. *N.W. Env'tl. Def. Ctr. v. Bonneville  
Power Admin.*, 117 F.3d 1520, 1527–28 (9th Cir. 1997).

25       <sup>4</sup> References preceded by "AR" are to Bates-numbered documents in the administrative  
26 record submitted by Defendants in three installments. (See Dkt. Nos. 48, 49, 53, 61, 63, 88, 89,  
90) (notices of filing administrative record, including amendments).

1 on congressional intent and speculates as to how Washington will respond to NOAA and EPA’s  
2 withholding, if mandated by the Court. (See Dkt. Nos. 93-1 at 15–17, 109 at 15–18.)  
3 Congressional intent, without some quantum of evidence, is not sufficient. *See Friends of the*  
4 *Earth, Inc. v. Laidlaw Env'l. Services (TOC), Inc.*, 528 U.S. 167, 185 (2000); *Alaska Ctr. for*  
5 *Env. v. Browner*, 20 F.3d 981, 984 (9th Cir. 1994). Nor is “conjecture about the behavior of other  
6 parties.” *See San Luis & Delta-Mendota Water Auth.*, 848 F.3d at 1233.

7 Whereas Defendants provide evidence that withholding grant funds is likely to increase,  
8 rather than reduce, harm to Plaintiff’s concrete interests. Defendants point to the actions of  
9 Oregon’s Coastal Management Program once NOAA began withholding 30% of Section 306  
10 grant funding in 2015 after NOAA made a final determination that the state failed to submit an  
11 approvable Section 306 program. *See* AR CZ0013614–15. The state’s Coastal Management  
12 Program eliminated “two-plus positions” and “all planning assistance and technical assistance  
13 grants to local governments.” AR CZ0013135. Local government’s “capacity to conduct  
14 development reviews and to enforce regulations that protect riparian and wetland resources” was  
15 significantly reduced. AR CZ0013138. Plaintiff provides no evidence to suggest that a similar  
16 result will not occur in Washington.

17 Plaintiff has failed to provide sufficient evidence to support its assertion that NOAA and  
18 EPA’s failure to withhold funds from Washington’s CZMA Section 306 and CWA Section 319  
19 grants represents a redressable procedural injury. Absent another basis to demonstrate standing  
20 as to Claims #2 and #3, and Plaintiff alleges none (*see generally* Dkt. Nos. 93-1, 109),<sup>5</sup> the Court  
21 does not have subject matter jurisdiction to adjudicate these claims. Accordingly, the Court will  
22 not reach Defendants’ other contentions in its motion for summary judgment. (*See generally* Dkt.  
23 No. 108 at 20–27.)

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26 <sup>5</sup> Plaintiff does not assert that it has standing for Claims #2 and #3 based on a substantive,  
rather than a procedural, injury. (*See generally* Dkt. Nos. 74, 93-1, 109.)

### III. CONCLUSION

For the foregoing reasons, Plaintiff's motion for partial summary judgment as to Claims #2 and #3 (Dkt. No. 93-1) is denied and Defendants' cross-motion for partial summary judgment as to Claims #2 and #3 (Dkt. No. 108) is GRANTED. The claims are dismissed without prejudice.

DATED this 12th day of July 2018.

John C. Coyne

John C. Coughenour  
UNITED STATES DISTRICT JUDGE